

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23892
Docket Number MW-23310

George E. Larney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(**Union** Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System **Committee** of the Brotherhood that:

(1) The Agreement was violated when outside forces were used to construct right-of-way fence between **M.P. 532** and **535** (Carrier's File **013-210-52**).

(2) **The** Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) Because of the aforesaid violations, the claimants listed below and others affected, each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside **forces**.

second Class Carpenters

D. T. McIntosh
V. A. **Lawson**
P. **C. Curby**

Painter Helper

D. D. Dalgarn

Laborers

W. W. Deuerlein, Sr.
R. L. Gilbert
J. L. Jacobson
J. Lesley
J. Lopez
R. **A. Gilbert**
A. L. Martinez
M. **R. Roark**
G. B. Roper
E. A. **Ziemens**
W. R. **Vasquez**
B. G. **Brayant, Jr.**
D. L. Buckardt
M. T. Houlihan
S. J. Kennedy
T. D. Miller
W. D. Taylor"

Snow Fence **Foreman**

D. G. Lester
J. F. Williams

B&B Helper

D. W. Hilton
D. B. Wentworth

OPINION OF BOARD: The **record** evidence reflects the disputed work complained of involved the installation of a **five-strand** barbed wire fence with steel posts, from Mile Post 532.25 to Mile Post **533.50** along Carrier's **main line** in the vicinity of **Granite Canon and Buford, Wyoming**.

The Organization alleges such work is contractually reserved to **members** of its craft as per Rule 8 of the controlling Agreement effective **January 1, 1973**. Rule 8 reads in relevant part as follows:

Rule 8 - Bridge and Building Subdepartment

"**The** work of construction, maintenance and repair of buildings, bridges, tunnels, wharves, docks, . . . and other structures, . . . snow and sand fences, . . . and other work generally so . . . recognized shall be performed by employees in the Bridge and Building Subdepartment."

The Organization argues that in addition to violating Rule 8 by having contracted out the disputed work, the **Carrier** also violated Rule **52(a)** by not giving it advance written notice of intention to so do.

The **Carrier defends** its action on the grounds that the installation of the right-of-way fence (**6,165** feet in length), was work **incidental** to the main and much larger job of "cleaning **cuts**" between Mile Post **532** and **535**. This effort involved widening of the "cuts" to alleviate the **drifting** of snow during the winter months and the **removal** of a huge **volume** of earth from the north side of the **main line** in order to **stabilize** adjacent "fills". **Carrier** claims the disputed work of installing the fence was performed by Circle "**v**", a subcontractor, who worked intermittently on the fence beginning September **9, 1978** and finishing on October 2, **1978**. **Carrier** maintains that the work of cut cleaning, including incidental fence work, is work which has customarily and historically been performed by outside contractors and up until now without prior complaint by the Organization. **Carrier** admits it failed to give the Organization advanced notice of its intention to contract-out the subject work, but insists such failure was neither willful nor malicious, but simply an oversight. Moreover, **Carrier** argues that Rule **52(d)** grants it the right, unimpaired, to assign work not customarily **performed** by employees covered by the Agreement to outside contractors.

In any event, irrespective of its substantive argument, **Carrier** asserts the statement of claim as originally presented on the property is defective in two respects and therefore fatal to the **Organization's** case. The first and **most** serious defect, **Carrier** alleges, is that the statement of claim handled on the property varies significantly **from** that which has been presented before the Board. The claim as originally presented on the property referred to the disputed work as having commenced on date of October **30, 1978**. **The** claim as presented before the Board makes no reference to this date and **Carrier** states the reason for this is the **Organization** was apprised the subject work **commenced** September **9, 1978** and ended October 2, **1978**. The second defect which arises as a function of the first defect is the Organization's having **inaccurately** identified four (4) of the twenty-five (25) Claimants. **The**

Carrier argues these four (4) Claimants were hired on dates following completion of the fence installation in question. Thus Carrier argues, the instant claim should be dismissed on procedural grounds alone.

Upon our deliberation of the entire record, we are persuaded the instant claim must fall on the grounds of procedural defect. We are not at all convinced that the disputed work complained of by the Organization is the same work that occurred between the dates of September 9 and October 2, 1978. The Organization has failed to present probative evidence to support its allegation the disputed work commenced at the end of October and continued on into the early part of November, 1978. It is apparent the Organization, though dropping reference to a specific date in its Statement of Claim presented before this Board, continues to stand by the date of October 30, 1978, as evidenced by the fact it continues to press the case at bar in the names of four (4) Claimants hired after October 2, 1978. In dismissing this claim we reiterate what was stated by the Board in Second Division Award No. 5396 as follows:

"Carrier contends that this claim should be dismissed for the reason that there is a variance in the claim as presented on the property and the claim as submitted to this Board ***.

It is, therefore, incumbent upon this Board to determine first whether or not the variance in the claim, as progressed on the property, and the claim as submitted to this Board, is fatal ***.

This Board finds that the claim presented to this Board is not in substance the same claim progressed on the property, and that, therefore, this claim must be dismissed because of its variance, in accordance with second Division Awards NO. 1471, 2165, 2208, 2582, 3462, 4353, 4621, and 4659.

The finding that this Board lacks jurisdiction because of the fatal variance of the claim, progressed on the property and claims submitted to this Board, renders a discussion of the merits of this case moot ***.

Claim dismissed."

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim be dismissed.

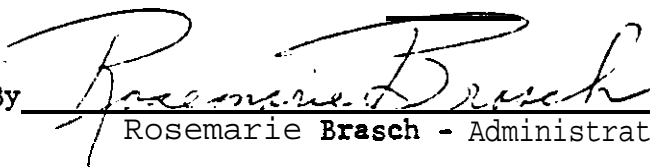
A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of May 1982.

